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No. 84-549

In the Supreme Court of the United States

OCTOBER TERM, 1984

IRVING M. DROBNY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JEFFREY COLE
ANDREW STAES
Jeffrey Neal Cole, Ltd.
155 North Michigan Avenue
Suite 700
Chicago, Illinois 60601
(312) 856-1950
Counsel for Petitioner

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UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

QUESTIONS PRESENTED

1. Whether, in the context of a criminal prosecution for violations of the federal securities laws, the jurisdictional requirement of §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 that the fraud occur "in connection with" the purchase or sale of a security is satisfied by misrepresentations which occur after the sale of stock, are not made to the seller, are causally unrelated to the sale of the stock, and do not pertain in any way to the stock or the consideration therefor.

2. Whether, in the context of a criminal prosecution for violations of the federal securities laws, it is permissible to instruct the jury that proof of a defendant's knowledge "may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him."

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NO.

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Mr. Irving Drobny petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1-12) is reported at 734 F.2d 1023 (5th Cir. 1984).[1]

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 13) was entered on May 24, 1984. A timely petition for rehearing was denied on July 5, 1984 (App. C, *infra*,

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[1] Pursuant to Fifth Circuit Rule 47.5, the court of appeals originally concluded the opinion should not be published (App. A, *infra*, 1). That determination was later changed, and the case was submitted for publication.

16). On September 5, 1984, Justice White extended the time for filing a petition for a writ of certiorari to and including October 3, 1984. (App. D, *infra* 18). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
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> • • •
>
> "(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 of the Securities and Exchange Commission provides:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security."

STATEMENT OF THE CASE

A.

In early 1981, Mr. Fred DeVeau acquired control of the Electric Car Company, located in Huntington Beach, California. Following the relocation of the business in San Antonio, Texas, DeVeau operated it under the name of Marquess Car Company. As the Court of Appeals noted, the operation was never viable and by late 1981, it had virtually ceased operations. (App. A., *infra*, 2).

By February, 1982, DeVeau had learned of the existence of Jet Industries, Inc., a publicly-held corporation in Austin, Texas, which was engaged in the business of manufacturing electrically powered vehicles. Despite the substantiality of its cash position, Jet was beset with serious financial problems and was actively seeking new management. In February, 1982, negotiations commenced between DeVeau and owners of the controlling block of Jet stock.[1]

During the course of the negotiations, DeVeau falsely misrepresented his background, his financial resources and his business acumen. Unknown to the prospective sellers, DeVeau had a rather sordid past which included his having served 38 months in prison for racketeering activity before entering the Department of Justice's Witness Protection Program in 1978. DeVeau, according to the indictment, also concealed from the prospective sellers that having once acquired control of Jet, he intended to repay various personal creditors with Jet assets.

By early April, 1982, an agreement was reached whereby DeVeau was to purchase 1,400,000 shares of Jet Industries stock from the William Bales family and Roe Owens for $1,200,000.00, with $600,000.00 cash as a down pay-

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[1] *See* App. A, *infra*, 2-3.

ment.[2] The closing was scheduled for April 8, 1982. Since DeVeau was only able to obtain a commitment for a $300,000.00 personal loan from Roy Diefendorf, president of the Plaza Bank in San Antonio, he began to search for additional sources of financing. (App. A, *infra*, 3).

It was at this point that petitioner, Mr. Irving Drobny, became one of the dramatis personae. Mr. Drobny, a Chicago lawyer, was the beneficial owner of a large block of Electric Car Company stock which he had pledged as collateral for a $350,000.00 loan from a Chicago bank.[3] By late 1981, the Electric Car stock pledged as collateral was essentially worthless, and the loan was in default.

Through a mutual friend, DeVeau enlisted Mr. Drobny's assistance in locating additional sources of financing. Mr. Drobny ultimately secured the remaining $300,000.00 needed for the down payment, from his friend and landlord, Joseph Rosin.[4]

On April 7, 1982, Mr. Drobny traveled to Austin for the Jet closing, carrying with him Rosin's cashier's check for $300,000.00. On April 8th, Mr. Drobny gave DeVeau Rosin's check, which was used to conclude successfully DeVeau's purchase of the Jet stock. Later that day, DeVeau attempted to give Mr. Drobny a check drawn on a Marquess Electric Car Company account as repayment

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[2] Apparently the balance of the purchase price was to be secured by a personal note from DeVeau.

[3] The loan was taken for the benefit of a third party, one David Jordan. (App. A, *infra*, 3).

[4] Rosin was to receive from DeVeau a $30,000.00 "fee" for the short term use of his funds. (App. A, *infra*, 4).

not good, but that he would cover it with money from a for Rosin. DeVeau told Mr. Drobny that the check was family "trust fund" that was expected to arrive in San Antonio the following day. Mr. Drobny refused the check for Rosin, informing DeVeau that Rosin would accept repayment only by cashier's check. DeVeau agreed to give Drobny a $330,000.00 cashier's check from the "trust fund" the following day. (App. A, *infra*, 4).

The next day, April 9, 1982, DeVeau told Mr. Drobny that the proceeds from the "trust fund" had not arrived, and Mr. Drobny was compelled to return home to Chicago empty-handed. Three days later, on April 11th, Mr. Drobny returned to Austin and was again told that the monies from the "trust fund" had still not arrived. DeVeau and Mr. Drobny then left Austin for San Antonio.[5]

On the morning of April 13th, DeVeau went alone to the Plaza Bank and opened an account with a deposit of $400,000.00 of Jet's monies. DeVeau then gave Mr. Diefendorf, President of the Plaza Bank, $300,000.00 to repay the monies which Diefendorf had loaned him to buy the stock.[6]

Later that afternoon, DeVeau returned to the bank with Mr. Drobny, who was again told that DeVeau's "trust fund" money still had not arrived. Mr. Drobny also learned that DeVeau had repaid $300,000.00 to Diefen-

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[5] On the 11th, DeVeau and Mr. Drobny were elected to Jet's Board of Directors. DeVeau also became Jet's Chief Executive Officer in accord with the stock purchase agreement. (App. A, *infra*, 3, 4).

[6] DeVeau also paid off an unrelated $70,000.00 personal loan. At trial, Diefendorf admitted that he was aware that the loans were being repaid with Jet assets. Diefendorf was not indicted.

dorf, although he was not told that the source of the repayment consisted of Jet's liquid assets. Undoubtedly under enormous pressure from Rosin, Mr. Drobny sought to obtain a cashier's check from the Plaza Bank with his personal check so that he could repay Rosin. Mr. Drobny assured Diefendorf that he was of substantial wealth, that he was a director of the Chicago bank where he maintained his account, and that his check was good—none of which was true. Diefendorf issued a $330,000.00 cashier's check in exchange for Mr. Drobny's personal check for the same amount.[7] *All this occurred five days after DeVeau's stock purchase.*

Mr. Drobny returned to Chicago and gave Rosin the cashier's check. In the days that followed, Diefendorf called Mr. Drobny several times in an effort to reconfirm that Drobny's check would be good. Although Mr. Drobny assured him that it would be, he made no effort to cover it with personal funds. On April 16, *eight days after DeVeau's stock purchase,* Diefendorf sent Mr. Drobny's check through normal banking channels. Concerned that the check might not clear, Diefendorf went to DeVeau and asked him to cover the check. DeVeau gave Diefendorf a $330,000.00 check drawn on Jet's account to cover Mr. Drobny's check. When that check was returned to the Plaza Bank on April 23rd for insufficient funds, Diefendorf cashed DeVeau's check.

During the weeks that followed, DeVeau misappropriated most of Jet's liquid assets. DeVeau paid several personal debts and repaid Electric Car's creditors. By the end of May, 1982, DeVeau had managed to dissipate more than $1 million of Jet's cash. None of these expendi-

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[7] App. A, *infra*, 5.

tures were known to, or approved by, Jet's Board of Directors. No merger of Jet and Electric Car was ever considered or approved by Jet's board.

After he gained control of Jet, DeVeau signed various Form 8K Current Form Reports filed with the SEC that falsified his background and falsely stated that a large portion of the cash used to acquire Jet came from his own funds. Jet officials began to suspect that DeVeau was using Jet assets irregularly, and the scheme was soon discovered.

On December 17, 1982, a federal grand jury sitting in the Western District of Texas, returned a 13 count indictment against Messrs. DeVeau and Drobny. Count 1 charged both men with a broad-based conspiracy to commit mail fraud, securities fraud, and fraud against the United States in violation of 18 U.S.C. §371. The purpose of the conspiracy was to obtain control of Jet Industries, Inc. and the Club Nautilus and thereafter to misappropriate their corporate assets.

Counts 2 through 6 charged that the defendants violated §10 of the Securities Exchange Act of 1934[8] and Rule 10b-5 of the Securities and Exchange Commission[9] in connection with DeVeau's purchase of stock in Jet Industries. Counts 7 through 13 charged DeVeau with mail fraud (18 U.S.C. §1341) and with having submitted false statements to the Securities and Exchange Commission (18 U.S.C. §1001).

Following a four week jury trial, Mr. Drobny was found guilty only on count 2 and was acquitted on all other counts. Mr. DeVeau was convicted on Counts 2 through

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[8] 15 U.S.C. §78j(b).

[9] 17 CFR 240.10b-5.

7 and 13.[10] DeVeau was sentenced to twenty years imprisonment, while Mr. Drobny was sentenced to four years imprisonment.

B.

Proper analysis of the questions presented in this Petition requires an appreciation of the theory upon which Count 2 was presented to the jury and upon which the court below affirmed the conviction: If at any time between April 13 and April 26,[11] Mr. Drobny knew that the $330,000.00 check he gave to Diefendorf was being covered with funds of Jet Industries, he must be found guilty of having violated §10 of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder. Thus, the prosecutor emphatically told the jury that:

> "Well, there is no question that Mr. Drobny may have been deceived about DeVeau's background and about his family trust because everybody was probably deceived about Mr. DeVeau about that. But, what Mr. Drobny wasn't deceived about was where the money was coming from that he got. *And, that is the theory of the Government's case.*" (Tr. 224) (Emphasis supplied).[12]

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[10] Prior to trial, the government dismissed Counts 9 and 10 of the indictment.

[11] It was on April 13th that Mr. Drobny lied to and gave his personal check to Mr. Diefendorf. In the ensuing days, that check moved through normal banking channels, and it was on April 26th that DeVeau covered the check with Jet funds. (App. A, *infra*, 12, n.4).

[12] In its "Sentencing Memorandum", the government claimed that the "evidence in the case detailed an elaborate scheme by defendant DeVeau to 'bootstrap' a purchase of Jet Industries [*viz.*, to use Jet's corporate assets to finance his purchase of Jet stock] . . . ." The government conceded that while "*there is no reason to believe that defendant Drobny shared either DeVeau's expertise in such matters or his specific plan with respect to Jet.*" he knew that DeVeau covered his $330,000 check with Jet cash. *Id.* at 2 (Emphasis supplied).

The district court's charge to the jury on Count 2, which accorded with the government's theory of the case, consisted of boiler-plate instructions which did no more than reiterate the language of 15 U.S.C. §78j and Rule 10b-5. (App. E, *infra,* 19). The jury was told that the government had to prove that Mr. Drobny engaged in or employed a scheme and artifice to defraud or made untrue statements of material fact and that these acts were done in connection with the purchase or sale of the Jet securities. (App. E, *infra,* 20). The court did not, however, make any attempt to delineate when a particular act could be deemed "in connection" with a securities transaction. While the jury was instructed that it had to find that Mr. Drobny *knowingly* violated 15 U.S.C. §78j and Rule 10b-5, it was told that that requirement could be satisfied "by inferences drawn from proof that [Mr. Drobny] deliberately closed his eyes to what would otherwise have been obvious to him." (App. A, *infra,* 10, n.2).

In a *per curiam* opinion, a panel of the Fifth Circuit sustained the judgment of conviction against Mr. Drobny on Count 2. The court did not pretend to suggest, nor could it, that Mr. Drobny played any role in or had knowledge of DeVeau's misrepresentations to Roe Owens or the Bales family at the time of the sale of the Jet stock.

Rather, the opinion held that Mr. Drobny's conviction for having violated the securities laws was proper since: (i) on April 13, 1982, *five days after the sale,* Mr. Drobny had employed a fraudulent scheme or device in his dealings with Mr. Diefendorf in order to obtain a $330,000.00 cashier's check from the Plaza Bank to give to Joseph Rosin in Chicago; (ii) Mr. Drobny "knew," sometime between April 13 and April 26, that DeVeau was covering, with Jet funds, the personal check which Mr. Drobny

had given to Mr. Diefendorf on April 13; and (iii) Mr. Drobny's fraud was "employed in connection with the instruments of interstate commerce [citations omitted]." (App. A, *infra*, 12 n.4).

REASONS FOR GRANTING THE PETITION

I.

This Case Presents Important Questions Concerning The Jurisdictional Reach Of The Federal Securities Laws' Antifraud Provisions That Should Be Resolved By This Court

A.

To state a claim or an offense under §10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the pleadings and proof "must enunciate the factual underpinnings for an exercise of authority by the federal courts." *Ketchum* v. *Green*, 557 F.2d 1022, 1025 (3d Cir.), *cert. denied*, 434 U.S. 940 (1977). First, there must be misrepresentation or fraud. *Santa Fe Industries Inc.* v. *Green*, 430 U.S. 462 (1977). Second, there must be a purchase or sale of a security. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723 (1955). Third, the fraud or misrepresentation must have occurred "in connection with" the purchase or sale of a security. *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6 (1971). Absent these elements, federal jurisdiction is wanting.

By its affirmation of Mr. Drobny's conviction, the Fifth Circuit necessarily, albeit implicitly, held that Mr. Drobny's misrepresentations to Roy Diefendorf on April 13, 1982, were "in connection with" the sale of Jet Industries' stock to Mr. DeVeau even though they: (i) occurred five days after the sale of the stock was completed; (ii) had nothing to do with the stock or the financial capability of the purchaser;[13] (iii) were made not to the seller of the stock but to a banker to induce him to issue a cashiers check to Joseph Rosin; and (iv) were causally unrelated to the purchase and sale of the Jet stock.

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[13] It cannot be too strongly emphasized that Mr. Drobny had no role in DeVeau's fraudulent misrepresentations to the sellers of the Jet stock. *See supra* at 8.

This holding, we submit, extends the reach of §10 and Rule 10b-5 far beyond that authorized by the Congress or the decisions of this Court. The decision below thus implicates important jurisdictional questions concerning the scope of the federal securities laws' antifraud provisions.[14]

B.

The question of the meaning to be accorded the phrase "in connection with the purchase or sale of any security" as used in §10(b) and Rule 10b-5 has troubled the Circuit Courts of Appeals and the district courts since *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6 (1971). There, in this Court's first exploration of Rule 10b-5, the Court found that as the result of a labyrinthine series of transactions, "Manhattan [Life Insurance Co.] was injured as an investor through a deceptive device which deprived it of any compensation for

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[14] We are not unmindful of the fact that the Fifth Circuit did not explicitly address the questions raised herein. Nor were the arguments advanced here made by Mr. Drobny's prior counsel. However, since this case involves important questions regarding the jurisdictional reach of the federal securities laws in a criminal case, that omission does not interdict review. *See* Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 702 (1982) (principles of waiver and estoppel not applicable where jurisdiction involved and question will be raised, sua sponte, by this Court); R. Stern and E. Gressman, Supreme Court Practice 458-460 (5th ed. 1978). Moreover, the incarceration of a citizen of the United States for conduct which is not violative of federal law is surely one of those "exceptional circumstances where the errors 'seriously affect the fairness, integrity or public reputation of public proceedings'" so that they may be reviewed by this court even though not explicitly passed upon by the Court below. Stern and Gressman, supra, at 460. *See also*, Vachon v. New Hampshire, 414 U.S. 478 (1974) (This Court will notice, sua sponte, error not raised below where evidence of a crucial element of the offense is wanting); Silbern v. United States, 370 U.S. 717 (1962) (especially in criminal cases, this Court will notice errors which are obvious); Weems v. United States, 217 U.S. 349, 362 (1909). Cf., Hormel v. Helvering, 312 U.S. 552, 557 (1942).

the sale of its valuable block of securities." *Id.* at 10. Since Manhattan "suffered an injury as a result of deceptive practices *touching* its sale of securities as an investor", *id.* at 12-13 (emphasis supplied), the Court concluded that the complaint stated a claim under Rule 10b-5.

In the thirteen years since *Bankers Life*, the lower courts have been understandably troubled by the lack of concrete guidance in what has come to be known as the "touch" test. Not surprisingly, their exegeses of the "in connection with" requirement of §10b and Rule 10b-5 have been anything but satisfactory, and the decisions are characterized by a lack of harmony and consistency. Thus, a number of courts have concluded that any fraud which "touches" a securities transaction satisfies the "in connection with" requirement, even though the fraud did not occur in the purchase or sale that is attacked (assuming the fraud and securities transaction can be integrated into the same scheme), the deceit did not concern the terms of the securities transaction, the claimant was not a party to the deceptive transaction, the fraud and the loss were merely indirectly connected, the securities transaction was only tangentially related to the fraudulent course of conduct, and the fraud was not aimed at causing a purchase or sale of a security.[15]

Other courts, recognizing that the meaning of *Bankers Life* cannot be derived from a hyper-literal parsing of the

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[15] *See, e.g.*, Mansbach v. Prescott Ball & Turben, 598 F.2d 1017, 1028 (6th Cir. 1979); Davis v. Davis, 526 F.2d 1287, 1290 (5th Cir. 1976); Houlihan v. Anderson-Stokes, Inc., 434 F.Supp. 1330 (D.D.C. 1977); Oliver v. Bostetter, 426 F.Supp. 1082 (D. Md. 1977); Wolford v. Equity Resources Corp., 424 F.Supp. 670 (S.D. Ohio 1976); 5 A. Jacobs, Litigation and Practice under Rule 10b-5, §38.01(b) at 2-43 to 2-44 (2d ed. 1981). *See also* McGrath v. Zenith Radio Corp., 651 F.2d 458 (7th Cir.), *cert. denied*, 454 U.S. 835 (1981).

word touch, surgically excised from the broader context of the opinion,[16] have rightly rebelled at the notion that *Bankers Life* intended to summarize in a single word, inherently imprecise and almost limitless in scope, the meaning of the phrase "in connection with the purchase or sale of any security."[17] For these courts, in order for the "in connection with" element to be satisfied, "there must be some *causal* relationship betwen the alleged deception and some *consequent* purchase or sale." *Liberty National Insurance Holding Co.* v. *Charter Co.*, 734 F.2d

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[16] *See Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.) ("It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."). *See also* Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979) ("[T]he language of an opinion is not always to be parsed as though we were dealing with the language of a statute.").

[17] Uncritical reliance upon Mr. Justice Douglas' choice of language—which, as Judge Friendly and Professor Loss have observed, appears to have been intended more as a matter of literary style than the articulation of a "test", Chemical Bank v. Arthur Andersen & Co., supra, 726 F.2d at 942—is a conspicuous illustration of how, in seeking "the just word, the happy phrase, that will give expression to the thought, . . . the thought itself is transfigured by the phrase when found," Cardozo, The Growth Of The Law 89 (1942), and "language react[s] upon thought so that conclusions [are] drawn . . . from the terms in which they happened to be expressed." Holmes, The Common Law 382 (Howe ed. 1963). *See also* Hyde v. United States, 225 U.S. 347, 391 (1912) (Holmes, J., dissenting) (it is "one of the misfortunes of the law that ideas become encysted in phrases and thereafter for a long time cease to provoke further analysis.").

545, 555 (11th Cir. 1984) (Emphasis supplied).[18] Thus, where the alleged fraud occurs *subsequent* to a purchase or sale of a security, the "in connection with" requirement of §10b and Rule 10b-5 is not satisfied.[19] Other courts have arrived at a contrary conclusion.[20]

The most recent and most incisive attempt to define the "in connection" requirement is Judge Friendly's decision in *Chemical Bank* v. *Arthur Andersen & Co.*, 726 F.2d 930

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[18] *See also* Ketchum v. Green, 557 F.2d 1022, 1028 (3rd Cir.), *cert. denied*, 434 U.S. 940 (1977); Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 194 (3d Cir. 1976); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968) (*En Banc*); Imperial Supply Co. Profit Sharing Trust v. Northern Ohio Bank, 430 F.Supp. 339 (N.D. Ohio 1976).

[19] *See, e.g.*, Raschio v. Sinclair, 486 F.2d 1029 (9th Cir. 1973), *cert. denied*, 426 U.S. 936 (1976); Zatkin v. Primuth, 551 F.Supp. 39, 43 (S.D. Calif. 1982) ("fraudulent acts which occur after a . . . purchase of stock cannot form the basis of a §10(b) claim because the acts are not performed in connection with the purchase or sale of stock."); Halperin v. Edwards & Hanley, 430 F.Supp. 121, 125 (E.D. N.Y. 1977) (and cases cited); Kogan v. National Bank of North America, 402 F.Supp. 359, 361 (E.D. N.Y. 1975) (to satisfy the "in connection with" requirement of Rule 10b-5, "the fraud must have been prior to or contemporaneous with the sale of securities; * * * frauds occurring subsequent to the sale of are not actionable under Rule 10b-5."); Pepsico, Inc. v. W. R. Grace & Co., 307 F.Supp. 713, 720 (S.D. N.Y. 1969) (no jurisdiction under Rule 10b-5 for "a fraud committed or practiced after a purchase or sale.").

[20] *See, e.g.*, Davis v. Davis, 526 F.2d 1286, 1290 (5th Cir. 1976) ("Even though the alleged scheme did not arise until after the contracts to sell had been entered", the scheme "sufficiency touche[d] the contracts to sell . . . securities to be 'in connection with' a sale."); Lanning v. Serwold, 474 F.2d 716, 719 (9th Cir. 1973) (Neither Rule 10b-5 nor §10 requires "that the fraud must occur prior to the consummation of the sale.").

(2d Cir. 1983), *cert. pending,* No. 84-264 (1984).[21] There, the complaint charged that, in reliance upon Arthur Anderson & Company's material misstatements regarding Frigitemp Corporation's financial solvency, four banks extended the repayment schedule on $16,000,000 in outstanding loans to Frigitemp and loaned $4,000,000 to its wholly-owned subsidiary, Elsters, Inc. The Elsters' loan was guaranteed by Frigitemp and supported by a collateral pledge of all the Elsters' stock. When Frigitemp shortly thereafter filed for bankruptcy, the banks sued Arthur Andersen for violations of the federal securities laws. 726 F.2d at 932-34.

The district court denied Andersen's motion to dismiss but certified the questions raised pursuant to 28 U.S.C. §1292(b). Speaking for a divided panel, Judge Friendly held that the replacement notes given by Frigitemp to the banks under the debt restructuring agreement were not "securities"; hence any fraud "in connection with" that restructuring was not within the scope of §17(a) of the federal securities laws. 726 F.2d at 932, *et seq.*

After a careful analysis of *Bankers Life,* the court held that while the collateral pledge of the Elsters' stock constituted the "purchase or sale" of a security, since there were no misrepresentations regarding the stock, Arthur Anderson & Company had not violated either the 1933 or 1934 Acts or Rule 10b-5. 726 F.2d at 943. Phrased differently, there was no fraud *"in connection with"* the purchase or sale of Elsters' stock:

> "In Rubin [v. United States], 449 U.S. at 429, n.6 . . . the Supreme Court stated that 'it need not decide whether misrepresentations or omissions in-

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[21] The Petition for Certiorari was filed on August 17, 1984, and the Brief in Opposition was filed on September 14, 1984.

volved in a securities transaction but not pertaining to the securities themselves can form the basis of a violation of §17(a).' We are here compelled to decide that question, with respect to §10(b) and Rule 10b-5 as well as §17(a); our answer is in the negative.

"The purpose of §10(b) and Rule 10b-5 is to protect persons who are deceived in securities transactions—to make sure that buyers of securities get what they think they are getting and that sellers of securities are not tricked into parting with something for a price known to the buyer to be inadequate or for a consideration known to the buyer not to be what it purports to be. Andersen is not alleged to have deceived the Banks with respect to the pledge of the Elsters stock; the Banks got exactly what they expected. Their showing is simply that but for Andersen's description of Frigitemp they would not have renewed the Frigitemp loans or made the Elsters loan which Frigitemp guaranteed, and that if they had not done this, there would have been no pledge of Elsters' stock. Such 'but-for' causation is not enough. The Act and Rule impose liability for a proscribed act in connection with the purchase or sale of a security; it is not sufficient to allege that a defendant has committed a proscribed act in a transaction of which the pledge of a security is a part." 726 F.2d at 943 (footnotes omitted).

C.

The affirmance of Mr. Drobny's conviction by the court below cannot be squared with Judge Friendly's decision in *Chemical Bank*, with those decisions which have held that fraud subsequent to a purchase or sale of securities does not satisfy the "in connection with" requirement of §10 and Rule 10b-5 (*see* cases cited *supra* at 14), or with recent decisions of this Court which have narrowly

read the "in connection" requirement,[22] and which have held that "a violation [of §10 or 10b-5] may be found *only* where there is intentional or willful conduct designed to deceive or defraud investors *by controlling or artificially affecting the price of securities.*" *Dirks* v. *SEC*, ... U.S. ....., 103 S.Ct. 3255, 3265, n.23 (1983) (Emphasis supplied).

In this case, Mr. Drobny had no involvement with DeVeau's fraudulent misrepresentations to the sellers of the Jet stock, *see supra* at 8-10; there was no causal connection between the sale of the stock to DeVeau on April 8th and Mr. Drobny's subsequent misrepresentations to Diefendorf five days later (*see* cases cited *supra* at 15); his alleged fraud was not directed against the sellers and did not "pertain to the securities themselves" or to the financial capabilities of the purchaser. *See supra* at 8-10. In short, his alleged misrepresenations were *not* "in connection with the purchase or sale of any security."

It is no answer to say that since Mr. Drobny was a director of Jet, his awareness that DeVeau was covering his personal check with Jet money constituted a fraudulent breach of fiduciary duty. As this Court has emphasized, not every fraud is actionable under the securities laws, and Mr. Drobny's conduct at most could be described as corporate mismanagement, which is outside the purview of the federal securities laws. *See Santa Fe Industries Inc.* v. *Green*, 430 U.S. 462 (1977).

More importantly, the case was not tried on this theory, and the jury was never instructed on the relationship between the federal securities laws and Mr. Drobny's breach of fiduciary duties. Rather, the jury was told, in the language of Rule 10b-5, that it could find Mr. Drobny guilty

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[22] *See* United States v. Naftalin, 441 U.S. 768, 773 n.4 (1979). In *Naftalin*, this Court held the "in connection with" language of §10b and Rule 10b-5 to be equivalent to "in the purchase or sale" language of §17a.

if they found that he had employed any scheme to defraud any person and that this occurred in connection with the purchase or sale of any security.

The district court made no attempt to define the "in connection with" element, [which itself is plain error, notable on this Court's own motion, *Screws* v. *United States*, 325 U.S. 91, 107 (1945)], and no instructions were given regarding "the nature or elements of a duty owed by petitioner to anyone. . . ." *Chiarella* v. *United States*, 445 U.S. 222, 237 (1980.)[23] Thus, even if Mr. Drobny's breach of fiduciary duty was violative of 15 U.S.C. §78j and Rule 10b-5, it could not sustain the conviction since a criminal conviction cannot rest upon a theory not presented to the jury. *Chiarella* v. *United States, supra.*

D.

The time is now at hand for this Court to clarify *Bankers Life* and to give substantive content to the phrase "in connection with a purchase or sale of any security" as used in the anti-fraud provisions of the federal securities laws. The need for such clarification stems not only from the inherent unworkability of the touch test --which inevitably invites dialectical reasoning and exercises in scholastic logic—but also from the doctrinal development of the securities laws over the past thirteen years. As one commentator has observed:

> "The policy bases of recent . . . decisions of [this Court[24]] strongly suggest that the touch test [of *Bankers Life*] is of dubious continuing vitality. * * * [T]he tension between the policy arguments of the

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[23] The instructions applicable to Count 2 are set forth in Appendix E, *infra*, 19.

[24] *See, e.g.*, Dirks v. SEC, ---- U.S. ----, 103 S.Ct. 3255 (1983); Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977); Ernst & Ernst v. Hochfelder, 425 U.S. 185 1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

Court and the holding of Bankers Life has become particularly acute. * * * As a result of this tension, the lower courts are divided in their analysis of the effect of the 'swinging pendulum' upon the precedential value of the touch test.''[25]

II.

The Scienter Instruction Approved By The Fifth Circuit Impermissibly Allowed The Jury To Convict On The Basis Of Either Negligence Or Recklessness

While neither §10b of the Securities Exchange Act nor Rule 10b-5 contains a specific *scienter* requirement, this Court has consistently held that both require a showing of intent to deceive, manipulate or defraud; negligent conduct will not suffice. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976). *Accord Dirks* v. *SEC*, ... U.S. ....., 103 S.Ct. 3255, 3265, n.23 (1983) (" 'a violation may be found only when there is intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.' "); *Aaron* v. *SEC*, 446 U.S. 680, 691, 695 (1980) ("*scienter* is an element of §10(b) and Rule 10b-5, regardless of the identity of the plaintiff or the nature of the relief sought.").

While *Hochfelder* stressed the "unmistakable Congressional intent to proscribe a type of conduct quite different from negligence," 424 U.S. at 199, the district court, over objection (Tr. 114-115), gave an instruction that allowed "[t]he element of knowledge [to] be satisfied by inferences drawn from proof that [Mr. Drobny] deliberately closed his eyes to what would otherwise have been obvious to him." The court below rejected the petitioner's argument that the instruction was improper. (*See* App.

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[25] Note, *The Pendulum Swings Farther: The "In Connection With" Requirement and Pretrial Dismissals of Rule 10b-5 Private Claims For Damages*, 56 Tex.L.Rev. 62, 68-69 (1977).

A., *infra*, 10, n.21). That instruction impermissibly diluted the *scienter* required to establish a securities violation under §10 and Rule 10b-5 since, in effect, it allowed a conviction based either upon negligence or recklessness.[26]

In *United States* v. *Valle-Valdez*, 554 F.2d 911 (9th Cir. 1977), the jury was instructed that they could not find the defendant guilty unless they found that he knew marijuana was in the vehicle at the time it was driven. That burden, the jury was told, could be satisfied by proof that "the Defendant acted with a conscious purpose to avoid learning the truth of the contents of the vehicle." *Id.* at 913. Finding the instruction "deficient", *id.* at 914, the Ninth Circuit reversed the conviction:

> "As far as it goes, this instruction is correct. *The error or deficiency lies in the instructions' failure to add that the defendant's 'conscious purpose to avoid learning the truth' is culpable only if the jury also finds beyond a reasonable doubt that he was aware of the high probability that the vehicle carried contraband. A deliberate avoidance of knowledge is culpable only when coupled with a subjective awareness of high probability.*
>
> "Because Valle-Valdez denied any knowledge or suspicion that contraband was in the automobile, a factual issue arose regarding his awareness of the high probability of the contraband's presence. That issue should have gone to the jury. The effect of the court's instruction was to keep the question from the jury and to create the possibility that Valle-Valdez was convicted for violating section 841(a)(1) even though he did not possess contraband 'knowingly,' as that word has been interpreted by us in *Jewell*." 554 F.2d at 914 (Emphasis supplied).

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[26] Significantly, the court below did not deny that, at a minimum, the instruction allowed a conviction to be based on recklessness. It dealt with this question by resort to its own prior decisions, which were not in the context of federal securities litigation.

This is precisely the situation which exists here: "Because [Mr. Drobny] denied any knowledge [that Jet Industries' funds were used to cover his check], a factual issue arose regarding his awareness of the high probability of [their use]." As in *Valle-Valdez*, the instruction in this case allowed the jury to convict Mr. Drobny without first finding that he intended to defraud or deceive as required by *Hochfelder*. Absent the inclusion of the "high probability" language, the jury was free to convict based on negligence, which is a risk inherent in any deliberate ignorance instruction. *See United States* v. *Garzon*, 688 F.2d 607, 609 (9th Cir. 1982); *United States* v. *Morales*, 577 F.2d 769, 775, n.6 (2d Cir. 1978).[27]

The Second Circuit has also been emphatic in requiring that a willful blindness charge contain not only the "awareness of high probability" language, *United States* v. *Morales*, 577 F.2d 769, 774 (2d Cir. 1978) (reversed conviction where language omitted); *United States* v. *Aulet*, 618 F.2d 182, 191 (2d Cir. 1980), but also that it refer to the "absence of defendant's actual belief in the nonexistence of the crucial fact." *Id.* at 191. *Accord United*

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[27] While the court in *Valle-Valdez* acknowledged that the evidence justified a finding of "awareness of high probability", 554 F.2d at 917, it nonetheless reversed the conviction since it was "probable that the erroneous instruction materially affected the jury's deliberations and verdict." *Id.* Thus, it is no answer to say that since there was sufficient evidence of actual knowledge regarding the use of Jet funds to cover Mr. Drobney's personal check, deficiencies in the willful blindness instruction are of no consequence. Since it is impossible to know on what basis the jury actually acted [that is, whether they found Mr. Drobny had actual knowledge or whether they inferred knowledge based on the willfull blindness instruction], the conviction cannot stand. *Cf.*, Greenbelt Publishing Association v. Bressler, 398 U.S. 6, 11 (1970); Stromberg v. California, 283 U.S. 359, 367-68 (1931). *Compare* Chiarella v. United States, 445 U.S. 222, 237, n.21 (1980).

States v. *Morales, supra; United States* v. *Bright,* 517 F.2d 584 (2d Cir. 1975).

These cases are consonant with the relevant precedents of this Court. In *Leary* v. *United States,* 395 U.S. 6 (1969), the Court was called upon to determine the intended scope of the word "knowing" as used in 21 U.S.C. §176(a).[28] In making that determination, the Court employed as a general guide the Model Penal Code's definition of "knowledge":

> " 'When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of the existence unless he actually believes that it does not exist.' " 395 U.S. at 46, n.93.

See also Turner v. *United States,* 396 U.S. 398, 416 and n.29 (1970); *United States* v. *Jewell,* 532 F.2d 697, 700-703 (9th Cir. 1976).

Not only did the instruction approved by the court below fail to include the "high probability" language, it also failed to provide that Mr. Drobny must be acquitted if the jury found he did not actually believe that Jet funds would be used to cover his check to Diefendorf. As a consequence, the instruction, in contravention of the teaching of *Hochfelder,* allowed the jury to convict Mr. Drobny, not only in the absence of proof of actual intent, but more disturbingly, upon proof if not of negligence then surely of recklessness.

Since *Hochfelder* has (i) disapproved negligence as the basis for liability and (ii) has left for another day resolu-

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[28] That section provided that a defendant's possession of marijuana was deemed sufficient evidence of illegal importation and of the defendant's knowledge of that importation. 395 U.S. at 12.

tion of the question of whether recklessness satisfies the *scienter* requirement in §10(b) of the 1934 Act and Rule 10b-5,[29] this case undeniably satisfies the criteria for review enunciated in Supreme Court Rule 17.1(c).

III.

The Scienter Instruction Approved By The Fifth Circuit Creates A Conflict Among The Circuits Regarding The Contents Of A "Willful Blindness" Instruction

There is a conflict among the circuits concerning the propriety, *vel non*, of a willfull blindness charge absent the inclusion of language requiring the defendant to have been "aware of a high probability" of the existence of the fact at issue. The Courts of Appeals for the Second and Ninth Circuits clearly require such language, and the Second Circuit requires, in addition, that the instruction make explicit reference to the absence of the defendant's actual belief in the non-existence of the crucial fact. *See* cases cited *supra*, at 22.

The Fifth and Eleventh Circuits, on the other hand, have expressly held that the omission in the charge of the requirement of an "awareness of high probability" is not error. *See United States* v. *Callahan*, 588 F.2d 1078, 1081-82 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); *United States* v. *Knight*, 705 F.2d 432, 434 (11th Cir. 1983). The First and Tenth Circuits have held that "although inclusion of the [awareness of high probability language] [is] preferable, [its] omission [does] not constitute *plain* error." *United States* v. *Glick*, 710 F.2d 639, 643-44 (10th Cir. 1983) (emphasis supplied). *Accord United States* v. *Cincotta*, 689 F.2d 238, 243-44 (1st Cir. 1982).

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[29] *Hochfelder* explicitly left open the question of whether reckless conduct satisfies the *scienter* requirement. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, n.4 (1983).

Finally, while the Sixth, Seventh and Eighth Circuits have approved deliberate ignorance instructions which did not contain a requirement of finding "an awareness of a high probability", they did not directly address the omission as an issue in the case. *See, e.g., United States* v. *Gullett*, 713 F.2d 1203, 1212 (6th Cir. 1983); *United States* v. *Petullo*, 709 F.2d 1178, 1181 (7th Cir. 1983); *United States* v. *Burns*, 683 F.2d 1056, 1060-61 (7th Cir. 1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 821 (1983); *United States* v. *Kershman*, 555 F.2d 198, 200 (8th Cir.), *cert. denied*, 434 U.S. 892 (1977).

In light of the salience of the intent requirement in cases involving criminal violations of §10(b) of the 1934 Act and Rule 10b-5, any instruction which threatens to erode the *scienter* requirement must not be allowed to stand. Assuming *arguendo* the propriety of a willfull blindness instruction in a securities fraud case, review by this Court is imperative to resolve the conflict among the Circuits regarding the contents and contours of such an instruction. *See* Supreme Court Rule 17.1(a).

CONCLUSION

In requiring that fraud be "in connection with" the purchase or sale of a security, Congress sought to establish the necessary degree of proximity between a securities transaction and fraud, without which §10(b) and Rule 10b-5 would " 'cover the corporate universe.' " *Santa Fe Industries, Inc.* v. *Green, supra,* 430 U.S. at 480. Indeed, the "in connection with" requirement is the only effective jurisdictional deterrent to a construction of the federal securities laws which, as occurred in this case, would make criminal, misconduct having no meaningful relationship to

a securities transaction and which did not threaten to undermine the goals subserved by §10(b) and Rule 10b-5.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEFFREY COLE
ANDREW STAES
Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1655

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FREDERIX P. DEVEAU and
IRVING M. DROBNY,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(May 24, 1984)

Before RANDALL, TATE and WILLIAMS, Circuit Judges. PER CURIAM:*

Defendants-appellants Frederix DeVeau and Irving Drobny appeal their convictions for securities fraud, mail fraud, and submitting false statements to the Securities and Exchange Commission ("SEC"). Because none of the issues they raise requires reversal, we affirm.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

The Scheme

The facts essential to deciding this appeal are as follows: In 1978, DeVeau, known then as Fred Pro, entered the Department of Justice's Witness Protection Program, after serving thirty-eight months in prison for racketeering activities. He was given a new identity and was relocated in San Antonio, Texas.

In February, 1981, DeVeau acquired control of the Electric Car Company, located in Huntington Beach, California, by promising to pay the sellers with whatever profits he could generate from the company. He relocated the business in San Antonio, and operated it under the name of the Marquess Car Company. The operation was never viable and, by late 1981, it had virtually ceased operations.

In early 1982, DeVeau was introduced to the management of Jet Industries, Inc. and he began efforts to purchase the company. Jet was a publicly-held corporation located in Austin, Texas, that was engaged in the business of manufacturing electric-powered vehicles. Jet was in desperate financial trouble, despite the fact that it was cash rich. Jet had been loaned more than $2 million by the United States Department of Energy, but was losing money precipitously and was actively seeking new management. After he acquired Jet, DeVeau planned to merge it with the defunct Electric Car Company, thereby giving the latter new funds and new life, and enabling it to pay off its creditors.

During negotiations with the directors and officers of Jet, DeVeau not only concealed his past criminal record, but also misrepresented his background and financial resources. An agreement was reached between DeVeau and Jet whereby DeVeau was to acquire 20% of Jet's stock

for $1,200,000, with $300,000 cash as a down payment. The agreement also provided that DeVeau would become Jet's chief executive officer after his purchase of the stock.

DeVeau had no funds and he made arrangements to borrow the $300,000 down payment from the Plaza Bank of San Antonio with the help of the bank's president, Roy Diefendorf. At the February 12, 1982 closing, Jet's representatives discovered that DeVeau had pledged Jet assets to collateralize his bank loan. DeVeau was told that such collateralization was both illegal and unacceptable to Jet, and the closing was aborted.

Negotiations continued between DeVeau and Jet's representatives, which led to a new agreement. No change was made in the purchase price, but the down payment was doubled to $600,000, and the closing was scheduled for April 8, 1982. Diefendorf arranged to secure $300,000 of the down payment through loans from some of the bank's depositors, but DeVeau was still short $300,000 of the $600,000 needed to close the deal.

Enter Drobny, a Chicago lawyer who was the beneficial owner of a large block of Electric Car Company stock. In 1981, Drobny had agreed to obtain a loan from a Chicago bank for the benefit of a friend, David Jordan. Jordan supplied Drobny with Electric Car stock to be used as collateral for the $350,000 loan. Jordan failed to make the loan payments, causing Drobny to default on the loan. By late 1981, the Electric Car stock pledged as collateral was essentially worthless. Drobny was anxious for DeVeau to acquire control of Jet and merge it with the Electric Car Company so that the Electric Car stock would regain its value, and Drobny could pay off the defaulted loan.

Drobny agreed to locate for DeVeau the remaining $300,000 needed for the down payment. Drobny obtained $300,000 from his friend and landlord, Joseph Rosin, by

promising Rosin that DeVeau would pay Rosin a $30,000 "fee" for the short term use of his funds. Rosin made Drobny agree not to hand over Rosin's $300,000 check until he had a certified check for $330,000 in hand as repayment. DeVeau agreed to pay Drobny a $200,000 "fee" for raising the money from Rosin.

On April 7, 1982, Drobny traveled to Austin for the Jet closing, carrying with him Rosin's cashier's check for $300,000. On April 8, Drobny gave DeVeau Rosin's check, which was used to conclude successfully DeVeau's purchase of the Jet stock. Later that day, DeVeau tendered to Drobny a series of checks drawn on a Marquess Electric Car Company account as repayment for Rosin and as partial payment of Drobny's $200,000 "fee." DeVeau told Drobny that the checks were not good, but that he would cover them with money from a family "trust fund" that was expected to arrive in San Antonio the following day. Drobny accepted the checks in partial payment of his fee, but refused the check for Rosin, informing DeVeau that Rosin would accept repayment only by cashier's check. DeVeau agreed to give Drobny a $330,000 cashier's check from the "trust fund" the following day.

The next day, DeVeau told Drobny that the proceeds from the "trust fund" had not arrived, and Drobny returned home to Chicago. On April 11, Drobny returned to Austin for a Jet Board of Directors meeting that was scheduled for the following day. Both DeVeau and Drobny had been elected to Jet's board after DeVeau had gained control of the company. At the meeting, Drobny moved to elect DeVeau as Chairman of the Board, and DeVeau was so elected. DeVeau was still unable to produce any "trust fund" money to repay Rosin, and both DeVeau and Drobny left Austin for San Antonio.

On the morning of April 13, DeVeau went to the Plaza Bank and opened an account with a deposit of $400,000 of Jet's monies. DeVeau then gave Diefendorf $300,000 to repay the loans that Diefendorf had arranged and repaid the bank for a long-overdue $70,000 loan.

DeVeau then left the bank, and returned later that afternoon with Drobny. When Drobny arrived at the bank, he learned that DeVeau's "trust fund" money had not arrived, despite DeVeau's representation to the contrary. Drobny also discovered that DeVeau had repaid the $300,000 Diefendorf had arranged. Drobny had not yet recovered Rosin's money, and he insisted upon buying a cashier's check from the Plaza Bank with his personal check so that he could repay Rosin. Although Diefendorf refused initially, Drobny assured Diefendorf that he was of substantial wealth, that he was a director of the Chicago bank where he maintained his account, and that his check was good—none of which was true. Diefendorf relented, and issued a $330,000 cashier's check in exchange for Drobny's check for the same amount.

Drobny returned to Chicago and gave Rosin the cashier's check. In the days that followed, Diefendorf called Drobny several times in an effort to reconfirm that Drobny's check would be good; Drobny assured him that it was, but made no efforts to cover it. Sensing that Drobny's check might not clear, Diefendorf went to DeVeau and asked him to cover the check. DeVeau gave Diefendorf a $350,000 check from Jet's monies to cover Drobny's check. When Drobny's check was returned to the Plaza Bank on April 23 for insufficient funds, Diefendorf used DeVeau's check to

cover Drobny's. Drobny never inquired who covered his check, or in what fashion it was made good.[1]

During the weeks that followed, DeVeau misappropriated most of Jet's liquid assets. DeVeau paid several personal debts, repaid Electric Car's creditors, and paid Drobny $165,000 of his $200,000 fee (the checks given to Drobny by DeVeau on April 8 had bounced). By the end of May, 1982, DeVeau had managed to dissipate more than $1 million of Jet's cash. None of these expenditures were known to, or approved by, Jet's Board of Directors. No merger of Jet and Electric Car was ever considered or approved by Jet's board.

After he gained control of Jet, DeVeau signed various Form 8K Current Form Reports filed with the SEC that falsified his background and falsely stated that a large portion of the cash used to acquire Jet came from his own funds.

Jet officials began to suspect that DeVeau was using Jet assets irregularly. The scheme was soon discovered, which led eventually to this criminal prosecution.

The Charges

A thirteen count indictment was returned against DeVeau and Drobny. Count One charged both appellants with conspiracy to commit mail fraud, securities fraud and fraud against the United States, in violation of 18 U.S.C.

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[1] Drobny's check for $330,000 was drawn on an account that never contained a balance exceeding $45,000 for the five-month period surrounding this transaction. On April 13, 1982, the day Drobny wrote the $330,000 check to the Plaza Bank, his balance was $9,769.40. After DeVeau covered Drobny's check, Drobny called Diefendorf to ask that the check be returned to him.

§ 371 (1982). Counts Two through Six charged both appellants with securities fraud, in violation of 15 U.S.C. § 78j(b) (1982). Counts Seven through Ten charged DeVeau with mail fraud, in violation of 18 U.S.C. § 1341 (1982), and Counts Eleven through Thirteen charged DeVeau with submitting false statements to the SEC, in violation of 18 U.S.C. § 1001 (1982).

Before trial, the government moved for and received a dismissal of Counts Nine and Ten. Trial lasted four weeks and the jury convicted both DeVeau and Drobny on Count Two, and DeVeau on Counts Three through Seven, and Thirteen. They were acquitted of the other charges.

DeVeau was sentenced to twenty years imprisonment, and Drobny to four. This appeal followed.

DeVeau

DeVeau's single contention is that the district court abused its discretion by refusing to grant his motion for severance when it became apparent that his defense and that of his co-defendant Drobny were "irreconcilable and mutually exclusive." DeVeau argues that his principal defense was that once he bought the Jet stock, a "de facto" merger occurred between Jet and the Electric Car Company, and that everyone knew that DeVeau's loans would have to be repaid from the sale of Electric's assets to Jet. Drobny's defense, DeVeau contends, was that a merger between Jet and Electric Car never in fact occurred, and that he thought that the money he received from DeVeau was from DeVeau's family trust. DeVeau maintains that in order for the jury to accept one of these defenses, it had to reject the other. As a result, he argues that he suffered "compelling prejudice" that warrants a new trial.

Persons indicted together should ordinarily be tried together. The decision whether to sever the defendants

lies within the discretion of the district court. *United States* v. *Berkowitz,* 662 F.2d 1127, 1132 (5th Cir. 1981). A trial judge's denial of severance "will not be lightly overturned, and a defendant has an extremely difficult burden of showing on appeal that the lower court's action was an abuse of discretion." *United States* v. *Johnson,* 478 F.2d 1129, 1131 (5th Cir. 1973). In order to establish an abuse of discretion, a defendant must show that he received an unfair trial and suffered compelling prejudice against which the trial court was unable to afford protection. *United States* v. *Berkowitz, supra,* at 1132.

When co-defendants have antagonistic defenses, we have applied very specific tests to determine whether the trial was unfair. "To compel severance the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive. The essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other." *United States* v. *Romanello,* 726 F.2d 173, 177 (5th Cir. 1984). Compelling prejudice does not arise where the conflict encompasses only minor or peripheral matters that are not at the core of the defense. *Id.*

We do not believe that DeVeau has fairly represented the core of each defendant's defense. Simply put, both DeVeau and Drobny maintained that Jet Industries had not been acquired in a fraudulent manner. The essence of DeVeau's defense was that his acquisition of Jet stock was done properly, and that the subsequent expenditure of Jet funds was pursuant to a "de facto" merger between Jet and the Electric Car Company. The core of Drobny's defense was that, as far as he knew, DeVeau's acquisition of the Jet stock was proper, and that he was unaware that DeVeau was using Jet monies. Thus, DeVeau and Drobny asserted that DeVeau had not used Jet funds to repay

directly DeVeau's loans from the Plaza Bank's depositors and Drobny.

At trial, DeVeau contended that the repayment of his loans resulted from the sale of his Electric Car Company assets; Drobny also contended that DeVeau's loan repayments were coming from DeVeau himself, not Jet funds. The fact that Drobny alleged that he thought the funds were coming from DeVeau's "family trust" rather than DeVeau's other personal assets (such as the proceeds from the sale of his interest in the Electric Car Company), does not contradict the heart of their defenses: that they did not fraudulently use Jet's assets. The jury did not have to reject DeVeau's explanation of events to accept Drobny's.

DeVeau also avers that severance was required in this case because Drobny and his lawyer displayed such an antagonostic attitude toward him at trial that he felt he was being attacked by a "second prosecution team."

The taking of an adversarial stance on the part of a co-defendant's counsel may generate trial conditions so prejudicial to the defendant under multiple attack as to deny him a fair trial. *See United States* v. *Johnson, supra.* We have carefully examined the more than 2,000 pages of testimony given at trial and find DeVeau's claim to be exaggerated. Although DeVeau cites certain instances where Drobny's counsel emphasized that Drobny had been duped by DeVeau, and characterized DeVeau as a "great con artist," several witnesses described in great detail how DeVeau had lied to them about his background and wealth. DeVeau's counsel himself noted that DeVeau had "duped" others as part of his scheme to acquire Jet without revealing his former identity. DeVeau also complains of an instance in which Drobny's counsel interjected DeVeau's criminal record into the trial, yet DeVeau's past offenses

were detailed in the indictment and were highlighted by the government in its opening argument. In sum, we do not find that the isolated instances of concerted attack that are contained in the record of this month-long trial created the compelling prejudice necessary to warrant a severance. *See, e.g., United States* v. *Sheikh*, 654 F.2d 1057, 1066 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982). Thus, we hold that the district court did not abuse its discretion in denying DeVeau's motion for severance.

Drobny

Drobny raises two issues concerning his conviction on Count Two, which alleged that Drobny, in connection with DeVeau's purchase of 1,400,000 shares of Jet securities, fraudulently used Jet assets to cover the $330,000 check he wrote to the Plaza Bank. Drobny's first argument relates to the court's instruction on "willful blindness."

At trial, Drobny denied that he knew DeVeau was using Jet funds to cover the $330,000 check used to purchase the cashier's check for Rosin. The district court instructed the jury that it could find that Drobny had such knowledge if he remained "deliberately ignorant" of DeVeau's looting Jet.[2] Drobny contends that the district court failed

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[2] The court instructed the jury that:

> The element of knowledge may be satisfied by inferences drawn from proof that a defendant deliberately closed his eyes to what would otherwise have been obvious to him. A finding beyond reasonable doubt of a conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact. It is entirely up to you as to whether you find a deliberate closing of the eyes, and the inferences to be drawn from such evidence. A showing of negligence or mistake is not sufficient to support a finding of willfulness or knowledge.

Record Vol. 6 at 247.

adequately to instruct the jury that it could not infer that Drobny had knowledge of DeVeau's misdeeds merely from Drobny's negligence or recklessness regarding the transaction in question. He asserts that the court should have instructed the jury that it could find that a defendant has knowledge of a certain fact only where he or she "is aware of a high probability of its existence."[3]

Our past decision make it clear that we do not require the inclusion of such language in a "deliberate ignorance" instruction, *see, e.g., United States* v. *Cook,* 586 F.2d 572, 579-80 (5th Cir. 1978), *cert. denied,* 442 U.S. 909 (1979), and the instruction given by the district court in this case comports with those we have approved in other cases. *Id.* at 579; *United States* v. *Evans,* 559 F.2d 244, 246 (5th Cir. 1977), *cert. denied,* 434 U.S. 1015 (1978).

Drobny also contends that there was insufficient evidence from which a reasonable jury could have concluded that Drobny knew Jet funds were used to cover his check. A brief review of the evidence illustrates that Drobny's claim is without merit.

Testimony at trial showed that on the morning of April 13, 1982, DeVeau told Drobny that his trust fund monies had arrived; yet when the two went to the Plaza Bank that afternoon, Drobny discovered that DeVeau had lied since no such funds had materialized. That day Drobny also learned that DeVeau had just paid Diefendorf for the other $300,000 raised for the Jet closing, notwithstanding

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[3] Drobny's argument is derived from *United States* v. *Jewell,* 532 F.2d 697 (9th Cir.) (en banc), *cert. denied,* 426 U.S. 951 (1976), where the Ninth Circuit held that a deliberate ignorance instruction should state that the required knowledge is established if "the accused is aware of a high probability of the fact in question." *Id.* at 704 n. 21.

the fact that the "trust fund" was non-existent, and DeVeau had no access to any other source of funds (other than Jet's).

On April 16, Drobny received a telegram from Hy Federman, Jet's underwriter, which accused DeVeau of misusing Jet assets, yet Drobny repeatedly lied to Federman, telling him that Rosin had not yet been repaid—apparently in an effort to conceal DeVeau's looting of Jet. Drobny also told his stockbroker that he thought Rosin had been repaid with Jet funds, yet he never alerted anyone to the fact that Jet was being defrauded—which is consistent with the theory that DeVeau and Drobny tatempted to milk Jet for all it was worth. Instead, Drobny several times assured Diefendorf that his check was good in an effort to convince Diefendorf that Rosin's repayment would come from Drobny's own assets, not Jet's. Finally, Drobny never made any effort to cover his worthless check, and he never made any inquiry as to how his check was covered.[4]

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[4] Drobny argues that in order to convict him of violating 18 U.S.C. § 78j(b), the government had to prove that, at the time Drobny wrote the check, he knew that DeVeau would cover it with Jet funds. We disagree. The government had to prove only that between April 13, the date Drobny wrote the check, and April 26, the day DeVeau covered it with Jet funds, Drobny knew that DeVeau was looting Jet to cover the check. By the time the check was covered with Jet monies, Drobny had never told Diefendorf (or Jet's representatives) of DeVeau's misappropriation of Jet funds to cover Drobny's check, and thus the check, which had traveled through interstate commerce, was an integral part of the scheme that defrauded Jet. In order to satisfy section 78j(b), the fraud need only be employed in connection with the instruments of interstate commerce, *see, e.g.*, *Gower* v. *Cohn*, 643 F.2d 1146, 1152 (5th Cir. 1981); *Myzel* v. *Fields*, 386 F.2d 718, 728 (8th Cir. 1967), and Drobny's subsequent lies with regard to the check fully

(footnote continued)

In conclusion, we believe that there was more than sufficient evidence from which a jury could conclude that Drobny knew that DeVeau was covering his check with Jet funds. As the government points out in its brief, the only evidence concerning DeVeau's continued assertions to repay Drobny with "trust fund" money came from Drobny himself. The jury refused to credit Drobny's story and "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States* v. *Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc) (footnote omitted), *aff'd on other grounds*, 103 S.Ct. 2398 (1983).[5]

(footnote continued)

satisfy this requirement.

Our rejection of Drobny's argument in this regard means, of course, that the jury did not have to be instructed that Drobny had to possess the necessary criminal intent at the time he wrote the check.

Drobny also argues that the jury's acquital on Count One, the conspiracy count, demonstrates Drobny's lack of criminal intent. However, we held in *United States* v. *Fuiman*, 546 F.2d 1155, 1157-58 (5th Cir.), *cert. denied*, 434 U.S. 856 (1977), that "if a jury has convicted a defendant on one count of an indictment, and the government has adduced evidence legally sufficient to convict the defendant on that count, then whatever the jury did with the remaining counts is immaterial to appellate inquiry." *See also United States* v. *Espinosa-Cerpa*, 630 F.2d 328, 332 (5th Cir. 1980).

[5] There was also sufficient evidence from which the jury could have found that Drobny deliberately closed his eyes to the fact that DeVeau covered Drobny's check with Jet funds. Drobny wrote a bad check to the Plaza Bank for $300,000 knowing that DeVeau

(footnote continued)

The judgment of the district court is AFFIRMED.

(footnote continued)

had paid off the other loans without any trust fund monies, yet Drobny never made any effort to cover the check and never asked how the check was covered, or by whom. Our holding here pretermits Drobny's argument that there was insufficient evidence from which the district court could have given the jury a willful blindness instruction.

APPENDIX B

We have requested the Judgment and Mandate from the Fifth Circuit. We shall send it under separate cover upon its receipt.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1655

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDERIX P. DEVEAU and
IRVING M. DROBNY,

Defendants-Appellants.

Appeal from the United States District Court for the

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion 5/24/84, 5 Cir., 198.., ... F.2d .....)
(July 5, 1984)

Before RANDALL, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ *Carolyn Denien Randall*

United States Circuit Judge

APPENDIX D

SUPREME COURT OF THE UNITED STATES
No. A-149

IRVING M. DROBNY,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 3, 1984.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 5th
day of September, 1984.

APPENDIX E

"In Counts 2 through 6, Defendants DeVeau and Drobny are charged with committing securities fraud. In deciding the guilt or innocence of the Defendants as to these counts, you are to consider the following instructions.

"Title 15, United States Code, Section 78 j(b) provides that:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mail, . . .

b) To use or employ, in connection with the purchase or sale of any security . . . , any manipulative or deceptive device or contrivance (in violation of Title 17, Code of Federal Regulations, Section 240.10 b-5)."

"Title 17, Code of Federal Regulations, Section 240.10 b-5 provides that:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, . . .

a) To employ any device, scheme, or artifice to defraud,

b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

"In order to find either Defendant guilty of the offense charged in the indictment, the Government must establish four essential elements beyond a reasonable doubt, as follows:

"1) That the Defendant;

"a) Employed any device, scheme or artifice to defraud, or

"b) Made any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"c) Engaged in any act, practice or course of business which operated or would operate as a froud or deceit upon any person;

"2) That the Defendant did so knowingly and willfully:

"3) That this was done in connection with the purchase or sale of the securities named in the indictment;

"4) That the Defendant used or caused the use of means or instrumentalities of interstate commerce, or the mails.

"A fact is "material" if a reasonable man would attach importance to the fact in determining his course of action.

"It is not necessary for the Government to establish that anyone relied on, or suffered damage as a consequence of, the Defendant's untrue statements, conceanments or omissions of materital facts, if any. It is enough that he made untrue statements of, or omitted to disclose, a material fact or facts in the expectation that such fact or facts would have been relied upon.

"The words "scheme" and "artifice" include any plan or course of action intended to deceive others, and to obtain, by false or fraudulent pretenses, representations, or promises, money or property from persons so deceived.

"The use of means or instrumentalities of interstate commerce or of the United States mails in furtherance of a scheme to defraud is an essential element of the crime charged. It is not necessary that such use be contemplated by the scheme, or that a Defendant intends such use. It is sufficient to establish this element of the crime if the means or instrumentalities of interstate commerce, or the mails were in fact used to carry out the scheme, and that such use was reasonably foreseeable. The matter whiich is moved in interstate commerce or mailed need not disclose on its face a fraudulent representation or purpose, or request for money, but need only be intended to assist in carrying out the scheme to defraud."